Supreme Court, U.S.
FILED

01 533 JUL 30 2001

OFFICE OF THE CLERK

No. _____

In The

Supreme Court of the United States

CARL R. BENAVIDEZ,

Petitioner,

v.

DEPARTMENT OF THE NAVY,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

PETITION FOR A WRIT OF CERTIORARI

CARL R. BENAVIDEZ
PO Box 7308
Lincoln Acres, CA 91947
(619) 470-9437
Pro se

39pp

QUESTION PRESENTED

As the result of a work related psychological injury, the petitioner herein at the request of his employer, the United States Navy, made simultaneously an application for retirement through the Civil Service Retirement System (CSRS) and a separate application for Workers' Compensation Benefits through the Department of Labor Office of Workers' Compensation Program. Although the application for Civil Service Retirement was approved first, the employer allowed the petitioner herein on December 4, 1985 to make a retroactive election between the two applications and the petitioner elected Workers' Compensation benefits in accordance with 5 U.S.C. 8116(b). An individual who elects Civil Service Retirement System benefits is a retired annuitant and not an employee of the United States Government while an individual on Workers' Compensation remains an employee.

The question presented is, is an individual denied due process of law, and the protections of the Fifth Amendment to the Constitution when he is deemed against his will to have retired from his employment with the United States Government as the result of an election of benefits made at the request of the United States Government? Stated in other words, does an individual who would otherwise remain an employee of the United States Government cease to be an employee of the United States Government when upon instruction from his

QUESTION PRESENTED – Continued

employer simultaneously elects both retirement benefits and workers' compensation benefits and then by chance the retirement benefits are granted first and he then subsequently and retroactively elects to receive worker's compensation benefits.

TABLE OF CONTENTS

Page

Question Presented i

Table of Contents iii

Table of Appendices iv

Table of Authorities v

Opinions Below 1

Statement of Jurisdiction 1

Constitutional and Statutory Provisions 1

Statement of the Case 1

Reasons For Granting the Writ 4

Conclusion 7

TABLE OF APPENDICES

United States Court of Appeals for the Federal Circuit Decision Dated March 8, 2001.....App. 1

Merit Systems Protection Board Initial Decision Dated July 19, 1999.....App. 11

Merit Systems Protection Board Final Order Dated December 21, 1999 .....App. 23

United States Court of Appeals for the Federal Circuit Order of Denial Dated May 1, 2001 ..App. 26

TABLE OF AUTHORITIES

Page

CASES:

Vacchiano v. Office of Personnel Management, 49 M.S.P.R. 1 (1991) 4, 6

CONSTITUTION AND STATUTES:

The Constitution Of The United States, Amendment #5 ..... i, 1, 4, 6

United States Code 5 U.S.C. 8116(b) ..... i, 1, 5

PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to reverse the judgment of the United States Court of Appeals for the Federal Circuit.

OPINIONS BELOW

The District Court's opinion denying the petitioner's request for a review of the Merit Systems Protection Board's decision was made and published on December 21, 1999. The court's order is now final.

STATEMENT OF JURISDICTION

The court of appeals entered its opinion and order on March 8, 2001 and denied a petition for rehearing on May 1, 2001 with an Order of Denial. The petitioner herein has 90 days from the date of the Order of Denial to file a petition for writ of certiorari.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Constitution of the United States, Fifth Amendment United States Code 5 U.S.C. 8116(b).

STATEMENT OF THE CASE

This case below arose as the appellant's appeal from the final order of the United States of America Merit

Systems Protection Board, Docket Number SF-0752-99-0348-I-1. The final order appealed here from is the final order of the United States of America Merit Systems Protection Board; Western Regional offices' initial decision dated July 19, 1999. This matter was heard before the Honorable Philip D. Reed, Administrative Law Judge.

In the initial decision the appellant filed an appeal seeking to revise his personnel records, which at the time showed he was a retired employee who retired from the agency in 1982. The appellant requested that the United States of America Merit Systems Protection Board revise his personnel record to reflect continuous employment from August 29, 1981.

The initial decision was to dismiss the appeal for lack of board appellate jurisdiction. This was done without a hearing. In the final decision dated December 21, 1999, the United States of America Merit Systems Protection Board denied the petition for review. It is from that final order that the appellant herein filed his appeal with the United States Court of Appeals for the Federal Circuit.

The underlying facts that give rise to this appeal are as follows:

The appellant herein from October 1981 simultaneously made application for retirement through the Civil Service Retirement System (CSRS) and workers' compensation benefits through the Department of Labor, Office of Workers' Compensation Program.

On August 31, 1981, the Department placed the appellant herein on leave without pay status. On

December 4, 1985, the appellant herein made an election between the two applications and on December 4, 1985, elected to receive Federal Employee's Compensation Act benefits in preference to any benefit which he may be entitled to receive under the Civil Service Retirement Act. This election was signed and dated December 4, 1985 and made effective retroactively to August 29, 1981.

It is the appellant's position herein that as a result of his election on December 4, 1985 to receive Federal Employee's Compensation Act benefits, he then retroactively became an employee effective August 29, 1981 and continues that status to the present time.

The appellant herein argued below that the Administrative Law Judge, in his initial decision dated July 19, 1999 before the United States of America Merit Systems Protection Board Western Regional Office, made an error in interrupting law and regulation. The appellant further argued that the Final Order, denying the petition for review, was erroneous in failing to identify, acknowledge and act upon the error in interpretation of law or regulation.

The appellant herein in 1981 suffered a disability causing him in 1981 simultaneously to request both a disability retirement and workers' compensation benefits. In 1981, Mr. Benavidez was placed on leave without pay status, although he had made both elections. Then in 1985, Mr. Benavidez was given the opportunity by the employer herein, the United States Navy to elect either Federal Employees' Compensation Act benefits or Civil

Service Retirement Act benefits. As a result of this election, Mr. Benavidez continued to be an employee of the United States Navy.

The court below relied heavily upon *Vacchiano v. Office of Personnel Management*, 49 M.S.P.R. 1, 5 (1991), in finding that the petitioner herein having once made an election for retirement benefits ceased to be an employee and therefore became an annuitant and remained an annuitant.

In doing so, the court below effectively denied the petitioner herein the protections afforded an employee for review of employee grievances under the Merit Systems Protection Board's jurisdiction and procedure. In addition, in finding that the petitioner herein was no longer an employee, Mr. Benavidez was denied all other collateral benefits attached to the status of employee.

REASONS FOR GRANTING THE WRIT

The petition for writ of certiorari herein should be granted, as the decision below and the reliance upon *Vacchiano v. Office of Personnel Management*, 49 M.S.P.R. 1, 5 (1991) are contrary to the laws of the United States, the Constitution of the United States and more specifically the Fifth Amendment to the Constitution of the United States. An applicable part of the Fifth Amendment to the Constitution states,

> No person shall be held to answer for a capital, or otherwise infamous crime unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in

> the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, *nor be deprived of life, liberty, or property, without due process of law;* nor shall private property be taken for public use without just compensation.

In the instant case, and in October 1981 while an undisputed employee of the United States Government, Mr. Benavidez had a real and substantial vested property right in his employment with the United States Navy. That vested employment right included not only compensation for his labor but also accrued and vested collateral benefits such as retirement, health, and grievance benefits to be adjudicated before the Merit Systems Protection Board.

In October 1981, at the request of the United States Government, Mr. Benavidez made a simultaneous election for both retirement (which would terminate his status as employee) and workers' compensation benefits (which would continue him as an employee with the United States Government).

By chance and by fiat the retirement benefits were approved first. Subsequent thereto, Mr. Benavidez' request for workers' compensation benefits were approved and he was given the chance to retroactively select either workers' compensation benefits or retirement benefits in accordance with 5 U.S.C. 8116(b) as cited on Page 7 of Petitioner's Petition for Panel Rehearing. The petitioner selected workers' compensation benefits.

Notwithstanding the above facts, the employer, the United States Navy has since August 1981, deemed Mr. Benavidez to be a retired annuitant and not an employee. The United States Navy has taken this position unilaterally and without the consent of Mr. Benavidez. As a result thereof, Mr. Benavidez has been denied the opportunity to present legitimate grievances to the Merit Systems Protection Board – a board that has jurisdiction to hear only grievances filed by employees. Because Mr. Benavidez is deemed by the respondent herein to be a non-employee, he has no voice in any forum to complain and has therefore been stripped of real and legitimate constitutional protection as the respondent's action has stripped him of his due process rights to appear before a legitimate forum.

The court herein should review the facts and the decision in *Vacchiano v. Office of Personnel Management* 49 M.S.P.R. 1, 5 (1991) and determine whether or not such a sweeping decision as to term all annuitants as non-employees to be in violation of the due process clause of the Fifth Amendment to the United States Constitution.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

CARL R. BENAVIDEZ
PO Box 7308
Lincoln Acres, CA 91947
(619) 470-9437
Pro se

United States Court of Appeals
for the Federal Circuit

00-3204

CARL R. BENAVIDEZ,

Petitioner,

v.

DEPARTMENT OF THE NAVY,

Respondent.

DECIDED: MARCH 8, 2001

Raymond H. Wood, of National City, California, argued for petitioner.

Lauren S. Moore, Attorney, Commercial Litigation Branch, Civil Division, Department of Justice, of Washington, DC, argued for respondent. With her on the brief were *David M. Cohen*, Director; and *Mark A. Melnick*, Assistant Director. Of counsel on the brief was *Dawn Gingerich*, Office of Counsel, Supervisor of Shipbuilding, Department of the Navy, San Diego, California.

Appealed from: Merit Systems Protection Board

Before SCHALL, *Circuit Judge*, FRIEDMAN, *Senior Circuit Judge*, and DYK, *Circuit Judge*.

FRIEDMAN, *Senior Circuit Judge*.

Two sets of statutory provisions govern benefits for federal employees who become disabled: (1) the Civil Service Disability Retirement System and (2) the Federal Employee's Compensation Act. The question is whether an employee who has retired on disability and been separated from the service, who subsequently is awarded

compensation benefits and elects those benefits in lieu of the retirement benefits, retroactive to a date on which he was on leave without pay, thereby converts his status from a retired annuitant to an employee on leave without pay. In this case, the petition alleges, thus terminating his retiree status would increase his worker's compensation benefits. The Merit Systems Protection Board (Board) held that it had no jurisdiction over his attempt to change his retirement status, and dismissed his appeal from his agency's refusal to change his status. We affirm.

I

The underlying facts are undisputed. In 1981, while employed by the Department of the Navy, the petitioner Carl R. Benavidez simultaneously (1) applied to the Office of Personnel Management (OPM) for civil service retirement disability and (2) filed with the Office of Worker's Compensation Programs in the Department of Labor a claim for compensation under the Federal Employees Compensation Act. Shortly after filing those applications, the Navy told him that, if both were approved, he could choose either system.

While the applications were pending, Benavidez was placed on leave without pay effective August 31, 1981. His disability retirement was approved effective April 6, 1982, on which date he was separated. He then began receiving disability retirement benefits effective on August 29, 1981, the day after his last pay date.

In 1985, Labor approved his claim for Worker's Compensation benefits, retroactive to August 29, 1981. Labor told him that he could choose to receive benefits under

either program, and provided him with an election form on which he was to check one of these two boxes following the words "hereby elect:"

> [ ] FEDERAL EMPLOYEES' COMPENSATION ACT BENEFITS in preference to any benefits which I may be entitled to receive under the Civil Service Retirement Act.
>
> [ ] CIVIL SERVICE RETIREMENT ACT benefits in preference to any benefits which I may be entitled to receive under the Federal Employees' Compensation Act.

He checked compensation benefits, and selected an effective date for his election of August 29, 1981. Since such election, he has been receiving the higher worker's compensation benefits in place of the disability retirement benefits he had received.

Benavidez then met with Navy Department officials in June 1995 to discuss his status as a retired employee. He contended that because his 1985 election to receive worker's compensation benefits was retroactive to August 29, 1981, he should have been treated as on leave without pay on that date rather than as retired. He sought a "correction" of his personnel records to show that status and an increase in his worker's compensation benefits to reflect the higher payments he allegedly would have received as an employee on leave without pay – particularly locality pay to which he believed he was entitled. The Navy informed him that since it "consider[ed] him retired as of 1981 and not a current employee," it was "not willing to accept any official appeal or complaint

from him." Four years later the Navy again told him that because he was retired, it "could not help [him] with any of [his] problems," and that if he was dissatisfied with that answer, he could appeal to the Board.

Benavidez did so. He repeated the argument he made to the Navy that when he elected worker's compensation benefits in 1981, his status should have been changed from a retiree to an employee on leave without pay as of that date and that in that status he was entitled to locality pay, timely increases in his base pay, and contributions to his retirement account service credit for retirement purposes. He requested the following relief:

> Correct my past and present incorrect salary payments. Update my official file to show me on a leave without pay status, on worker's compensation, since August 29, 1981. See that my retirement fund amount is retroactively funded to reflect the fact that I have been on worker's compensation, in a LWOP status, since August 29, 1981. Ensure that in the future, contributions are made to my retirement fund in a correct manner.

In his initial decision, which became final when the Board declined to review it, the Board's administrative judge dismissed the appeal for want of jurisdiction. *Benavidez v. Dep't. of the Navy*, No. SF-0752-99-0348-I-1 (M.S.P.B. July 19, 1999) ("Initial Decision"). He stated: "To establish Board jurisdiction [in disability retirement cases], an appellant who claims to have been constructively removed through an involuntary disability retirement must show that there was an accommodation available on the date of his separation that would have

allowed him to continue his employment, and that the agency did not provide him that accommodation." Initial Decision, slip op. at 5. Noting that Benavidez "agrees that he voluntarily sought, and was granted disability retirement in 1982," the Board concluded that his "undisputed election of one benefit over the other in 1985 did not change his legal status as an annuitant, i.e., 'a former employee . . . who, on the basis of his service meets all requirements of claim therefor [sic]. . . . ' " Initial Decision, slip op. at 6-7 (omissions in original).

The Board further held that Benavidez's allegations "would not establish that [the] Board has jurisdiction to order" the Navy "to cancel his 1982 retirement, and retroactively return him to its rolls on leave without pay" or that his retirement was involuntary. Initial Decision, slip op. at 5-7.

II

Under 5 U.S.C. § 8337(a),

> An employee who completes 5 years of civilian service and has become disabled shall be retired on the employee's own application or on application by the employee's agency. Any employee shall be considered to be disabled only if the employee is found by the Office of Personnel Management to be unable, because of disease or injury, to render useful and efficient service in the employee's position and is not qualified for reassignment . . . to a vacant position which is in the agency at the same grade or level and in which the employee would be able to render useful and efficient service.

The amount of such disability annuity generally is a percentage of the employee's pay. 5 U.S.C. § 8339(g).

The statutory provisions governing worker's compensation benefits provide that "[t]he United States shall pay compensation as specified by this subchapter for the disability or death of an employee resulting from personal injury sustained while in the performance of his duty." 5 U.S.C. § 8102. Depending upon whether the disability is total or partial and its nature, there is a varying scale of benefits depending upon the employee's injury. 5 U.S.C. §§ 8105-8107. An employee cannot receive benefits under both systems, 5 U.S.C. § 8337(f)(1), but may receive "the greater benefit conferred by" either system, 5 U.S.C. § 8337(f)(3).

The Federal Personnel Manual, which was in effect at the time Benavidez submitted his retirement application on October 1, 1981, pointed out that a disabled employee "may be eligible for both an annuity under the retirement system and also compensation for work injuries"; that generally "the person may not receive an annuity and compensation for the same period of time. Therefore, the person should apply for whichever benefit is to his or her advantage"; and that "[e]ven though the employee elects to receive compensation, he or she should also apply for retirement upon separation from his or her position. Although annuity payments will be suspended during the period the person is receiving compensation, only if the person so applies and elects a survivor-type annuity can he or she provide continuity of survivorship protection under the retirement system. In addition, this will protect the person's own annuity rights should his or her

compensation be discontinued." Fed. Pers. Manual Supplement 831-1, Subchapter S7-1 (Sept. 21, 1981).

That is precisely what Benavidez did. When he became disabled, the Navy advised him to apply for both disability retirement and worker's compensation benefits, and that if he were granted both, he could elect whichever he preferred. When he received disability retirement, he was retired and became an annuitant. Three years later he was awarded worker's compensation benefits and elected to receive those higher benefits in lieu of the disability retirement he had been receiving, retroactive to the date on which he began receiving his disability retirement.

Benavidez contends, however, that because his worker's compensation benefits were made retroactive to August 29, 1981, his present status is the same as it was then; that since he was on leave without pay on that date, he still is in that status; and that the result was to cancel his subsequent retirement effective April 6, 1982. Although ingenious, the argument is unpersuasive.

Benavidez's election of benefits under the worker's compensation system instead of federal disability retirement benefits was just that: a selection of the particular benefits he would receive on account of his disability and the retroactive date upon which those benefits would commence. The form on which he made that election required him to state whether he "elect[ed] . . . FEDERAL EMPLOYEES' COMPENSATION ACT BENEFITS in preference to any benefits which I may be entitled to receive under the Civil Service Retirement Act [or] CIVIL SERVICE RETIREMENT ACT benefits in preference to any

benefits which I may be entitled to receive under the Federal Employees' Compensation Act." The only choice he made was between the "benefits" under the two systems.

His selection of benefits under the worker's compensation program and the retroactive date of those benefits involved only the nature and date of the benefits. It did not restore him to the leave without pay status he had been in on August 29, 1981. That status was superseded by his retirement when he was separated from the service on April 6, 1982, following approval of his disability retirement. To this day, he remains a retired annuitant and did not cease to be such merely because he shifted his disability benefits from the Civil Service Retirement System to the Worker's Compensation System. As the Board has correctly stated: "An individual who otherwise qualifies as an annuitant does not cease to be an annuitant by electing to receive OWCP benefits as authorized by the Federal Employee Compensation Act (FECA) in lieu of annuity benefits under the provisions of 5 U.S.C. § 8337(f)." *Vacchiano v. Office of Pers. Mgmt.*, 49 M.S.P.R. 1, 5 (1991) (footnote and citation omitted).

Placing an employee on leave without pay is a temporary measure designed to cover an interim situation pending final resolution. *Cf. O'Neill v. Office of Pers. Mgmt.*, 76 F.3d 363, 363 (Fed. Cir. 1996) (placing an employee in leave without pay status while he challenged his removal); *Schultz v. United States Navy*, 810 F.2d 1133, 1137 n. * (Fed. Cir. 1987) ("An agency is not required, of course, to indefinitely retain an employee on its rolls who cannot work due to poor health. The proper procedure here would have been for the agency to have granted

leave (including leave without pay, if necessary)" pending resolution.). In the case of an employee who is temporarily disabled but is expected to recover fairly soon and be able to resume his work, putting him on leave without pay would be an appropriate temporary measure. *Cf. Walker v. Dep't of the Navy*, 106 F.3d 1582, 1583 (Fed. Cir. 1997) (employee who injured his back was placed on leave without pay until he could return to work). We know of no case, however, and Benavidez cites none, in which leave without pay has continued for the twenty years during which he apparently contends he was in that status. To the contrary, he was placed on leave without pay for a limited time. The order putting him in that status stated "NTE [not to exceed] 04/06/82" – the date on which he was separated. His leave without pay ended on that date, and thereafter he was a retired annuitant.

In the present case, the Board pointed out that for it to have jurisdiction in a case of an allegedly involuntary disability retirement, the employee "must show that there was an accommodation available on the date of his separation that would have allowed him to continue his employment, and that the agency did not provide him that accommodation." Initial Decision, slip op. at 5. Benavidez has not even attempted to make such a showing. To the contrary, he recognizes, and the record shows, that he voluntarily sought and obtained a disability retirement.

Benavidez contends that the government misled him into seeking disability retirement because it told him to apply for benefits under both retirement systems and that if he qualified under both, he could elect retroactive benefits under either system; and that he did not obtain

the retroactive benefits he had been promised. There was no misrepresentation. He was given retroactive benefits, and permitted to select their effective date. His complaint is not about the retroactivity of those benefits, which he obtained, but about their amount. The government made no representation about the amount of those benefits.

In sum, Benavidez has not presented any grounds that validly invoked the Board's jurisdiction to review voluntary disability retirements. Perhaps the Board more appropriately could have based its decision on Benavidez's failure to state a claim on which relief could be granted rather than on lack of jurisdiction. *See Spruill v. Merit Sys. Prot. Bd.*, 978 F.2d 679, 686-89 (Fed. Cir. 1992). We nevertheless deem it appropriate to affirm the Board's dismissal of the appeal for lack of jurisdiction. *Cf. Bivings v. United States Dep't of Agric.*, 225 F.3d 1331, 1335-36 (Fed. Cir. 2000).

CONCLUSION

The decision of the Board dismissing Benavidez's appeal is

AFFIRMED.

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
WESTERN REGIONAL OFFICE

CARL R. BENAVIDEZ, Appellant, v. DEPARTMENT OF THE NAVY, Agency.	DOCKET NUMBER SF-0752-99-0348-I-1 DATE: July 19, 1999

Carl R. Benavidez, Lincoln Acres, California pro se.

Steven J. Ortega, San Diego, California, for the agency.

BEFORE

Philip D. Reed
Administrative Judge

INITIAL DECISION

INTRODUCTION

The appellant has filed an appeal seeking to revise his personnel records, which now show that he retired from the agency in 1982, so that they reflect continuous employment since that date. A hearing is requested.

For the reasons explained below, the appeal is DISMISSED for lack of Board appellate jurisdiction, without a hearing.

ANALYSIS AND FINDINGS

It is undisputed that in April 1982 the Office of Personnel Management (OPM) granted the appellant's application for disability retirement benefits under the Civil Service Retirement System (CSRS),[1] and the agency subsequently effected his retirement from federal service on April 6, 1982.[2] It is also agreed that in 1985, the appellant elected to receive Federal Employees' Compensation Act benefits in preference to benefits under the Civil Service Retirement Act.[3]

In his petition for appeal, the appellant asks the board to "[u]pdate [his] official file" to reflect that he is still an employee of the agency "on a leave without pay status, on worker's [*sic*] compensation, since August 29, 1981."[4] He also asks that the agency be ordered to adjust his nominal salary to reflect current base pay and locality pay for the position he occupied on the date of his retirement; assure that his life insurance coverage reflects his current pay level; and "[s]ee that my retirement fund amount is retroactively funded" for the intervening years.[5]

---

[1] *See* Initial Appeal File (IAF), Tab 14, Attachment 2.

[2] *See id.*, Tab 1, at 6.

[3] *See id.*, Attachment C.

[4] It is undisputed that this accurately reflects the date on which the appellant's pay ceased, and he entered leave without pay status with the agency. *See id.*, Attachment A, paragraphs 29, 30; Tab 14, Attachment 4.

[5] *See* IAF, Tab 1, Attachment A, paragraph 29; Tab 16, at 2-3.

The appellant explains that in 1981 he applied simultaneously for OPM disability retirement and workers' compensation benefits through the Department of Labor, Office of Workers' Compensation Programs (OWCP); both applications were ultimately granted; in 1985 he elected to receive OWCP benefits instead of disability retirement; as a result, he repaid to the government all money that he had previously received from disability retirement; and he has since received only OWCP benefits, and continues to do so. The appellant maintains that when he elected OWCP benefits in 1985, and repaid all money that he had received from disability retirement, his disability retirement ceased and he reverted to his former status as an employee of the Navy on leave without pay.[6]

The appellant emphasizes that he is not alleging that he was involuntarily placed on disability retirement. Rather, he is attempting to increase the amount of workers' compensation benefits he has been receiving from OWCP, which he believes is too low. The reason for this, he contends, is that he should be receiving additional OWCP benefits to reflect locality pay, to which he is entitled as a purported employee of the Department of the Navy on leave without pay. He approached the Navy about this in 1995, and was told that he was "retired as of 1981 and not a current employee" of that agency.[7] He believes that this is incorrect, and so filed this appeal,

---

[6] *See id.*, Tab 15, at 2.

[7] *See id.*, Tab 12, Enclosure 1A.

seeking to correct his records to reflect continuous employment since 1981.[8]

In various orders and at a telephonic close of record conference, the appellant was informed of the Board's limited jurisdiction with regard to retirement and workers' compensation matters, notified that his claims did not appear to be within those boundaries, notified of his burden of proof on the issue of jurisdiction, and afforded an opportunity to file evidence and argument to sustain that burden. He was also informed that if he did not make non-frivolous allegations which, if proven, would establish that Board jurisdiction exists, his appeal must be dismissed without affording him the hearing that he requested.[9] Both parties have responded and the record on jurisdiction is now closed.

The appellant has not made non-frivolous allegations of fact which, if proven, would establish that the Board has jurisdiction in this appeal.

The appellant bears the burden of proving that the Board has jurisdiction over his appeal, by preponderant evidence. *See* 5 C.F.R. § 1201.56(a). The Board's jurisdiction is not plenary; it is limited to those matters over which it has been given jurisdiction by law, rule, or

---

[8] *See id.*, Tab 15, at 1; Tab 12, at 1-6. At the close of record conference, the appellant indicated that he intends to amend his appeal, in order to state a claim of illegal discrimination. *See id.*, Tab 15, at 2 n.1.

[9] *See id.*, Tabs 2, 10, 15. The appellant was also notified that his appeal appeared to be untimely filed, and ordered to show cause why it should not be dismissed on that basis. *See id.*, Tab 10, at 2-3.

regulation. 5 U.S.C. § 7701(a); *Martinez v. Merit Systems Protection Board*, 126 F.3d 1480, 1482 (Fed. Cir. 1997). To be entitled to a hearing, the appellant must raise non-frivolous allegations of fact which, if proven, would establish that the Board has jurisdiction. *See Dumas v. Merit Systems Protection Board*, 789 F.2d 892, 894 (Fed. Cir. 1986).

A retirement is presumed to be a voluntary act and, therefore, beyond the Board's jurisdiction. *Mintzmyer v. Department of the Interior*, 84 F.3d 419, 423 (Fed. Cir. 1996); *see also Cruz v. Department of the Navy*, 934 F.2d 1240, 1244 (Fed. Cir. 1991) (en banc). With regard to retirements in general, this presumption may be rebutted if the employee can establish that he decided to retire as a result of the agency's coercion or duress, or because of misinformation that was provided to him by the agency. *See Silvestri v. Department of the Army*, 60 M.S.P.R. 594, 598-99 (1993). On the other hand, if his decision to retire was the result of his own mistaken belief, of which the agency had no knowledge, then it will not be deemed involuntary. *See Holser v. Department of the Army*, 77 M.S.P.R. 92, 95 (1997).

With regard to disability retirements in particular, a different standard applies. Absent a statutory exception, the Board's jurisdiction over an appeal is generally controlled by the person's status on the effective date of the action being appealed. *Anderson v. U.S. Postal Service*, 67 M.S.P.R. 455, 457 (1995); *Godfrey v. Veterans Administration*, 40 M.S.P.R. 438, 441 (1989). Focusing on the effective date is particularly appropriate when an employee retires on the basis of a disability. If the employee is unable to render useful and efficient service at the time of his separation, either in his present position, or in a vacant

position to which he could be reassigned, he meets the statutory requirements for disability retirement. *See* 5 U.S.C. § 8337(a). Under these circumstances, there is no true choice between working (with or without accommodation) and not working, and disability retirement cannot be considered as a removal within the meaning of 5 U.S.C. § 7512(1). *Nordhoff v. Department of the Navy*, 78 M.S.P.R. 88, 90-91 (1998), *aff'd*, No. 98-3210 (Fed. Cir. Mar. 9, 1999) (Table). To establish Board jurisdiction, an appellant who claims to have been constructively removed through an involuntary disability retirement must show that there was an accommodation available on the date of his separation that would have allowed him to continue his employment, and that the agency did not provide him that accommodation. *Id.*

The appellant agrees that he voluntarily sought, and was granted disability retirement in 1982. As a matter of law, he argues, he was in a "temporary disability retirement" status from that point until 1985, when he elected OWCP benefits in lieu of an annuity; and the agency was then obligated to cancel his 1982 retirement and retroactively return him to its rolls on leave without pay.[10]

I find that these arguments are mistaken. In *Vacchiano v. Office of Personnel Management*, 49 M.S.P.R. 1, 5 (1991), the Board held that an individual who otherwise qualifies as an annuitant, does not cease to be an annuitant by electing to receive OWCP benefits in lieu of annuity benefits under CSRS. *See id.* I therefore find that the appellant's undisputed election of one benefit over the

---

[10] *See id.*, Tab 16, at 1-2.

other in 1985 did not change his legal status as an annuitant, i.e., "a *former employee* . . . who, on the basis of his service meets all requirements of this subchapter [III of Chapter 83, Title 5 U.S.C.] for title to annuity and files claim therefor. . . . " 5 U.S.C. § 8331(9) [emphasis supplied.] *See Ochoa v. Department of the Navy*, 65 M.S.P.R. 39, 42 (1994). Thus, the appellant's allegations, if proven, would not establish that a change in status occurred, requiring the correction he seeks.

Those allegations also would not establish that Board has jurisdiction to order such a correction, if one were necessary. The appellant has not identified, nor can I discern any law, rule or regulation that allows an appeal to the Board from such inaction. *See* 5 U.S.C. § 7701(a); 5 C.F.R. § 1201.3. *See also, e.g., Metzenbaum v. Department of Justice*, 54 M.S.P.R. 32, 35 (1992); *Hicks v. Department of the Navy*, 33 M.S.P.R. 511, 513 (1987). In particular, I find that 5 C.F.R. Part 353 would not apply, insofar as the appellant does not allege either full or partial recovery from his compensable injury, or that he asked the agency to restore him to active duty. *See* 5 C.F.R. § 353.304; *Oswald v. United States Postal Service*, 5 M.S.P.R. 385, 386-87 (1981).

With regard to involuntary retirement: Not only does the appellant deny that this occurred, his factual allegations would not support a finding of involuntariness. He does not allege that there was any accommodation available on the date of his retirement that would have allowed him to continue active duty with the agency; rather, he alleges that accommodation could have been provided in 1985, by retroactively reinstating him to the agency's rolls in non-duty, non-pay status effective 1982,

and continuing him in that status indefinitely.[11] An agency is not required to grant leave without pay where there is no foreseeable end to the employee's absence. *See Bucci v. Department of Education*, 43 M.S.P.R. 558, 563 (1990); *also see generally Bologna v. Department of Defense*, 73 M.S.P.R. 110, 114 (1997), *aff'd*, 135 F.3d 774 (Fed. Cir. 1997) (Table). An open-ended request for unscheduled leave without pay has been found to be an unduly burdensome accommodation. *See Widger v. Veterans Administration*, 37 M.S.P.R. 368, 372-73 (1988). *See also Bond v. Department of Energy*, MSPB Docket No. NY-0752-97-0298-I-1, ¶ 23 (June 18, 1999) (open-ended "latitude" granted to an appellant in leave and attendance matters constitutes an unduly burdensome accommodation). I find that the appellant has not alleged facts which, if proven, would establish that a return to leave without pay status was reasonable under the circumstances that prevailed in 1985, much less those at present, insofar as he allegedly remains incapacitated to this day. Thus, he has not alleged facts which, if proven, would show that his disability retirement was involuntary under the standards set forth in *Nordhoff*, 78 M.S.P.R. at 90-91.

Nor, I find, would they show that the action was involuntary under the standards applicable to retirement in general. Even if the appellant were to be convinced that his reading of the law is incorrect, and contend that he retired because of this mistaken belief, he has not alleged that his misunderstanding was based on information supplied by the agency, or that the agency had

---

[11] *See id.*, Tab 10, at 3-4, questions (1) and (2); Tab 12, at 4-5, answers (1) and (2).

reason to know of his error. Thus, he has not alleged facts which, if proven, would demonstrate that his retirement was caused by misinformation provided by the agency. *See Holser*, 77 at 95; *Scharf v. Department of the Air Force*, 710 F.2d 1572, 1574-75 (Fed.Cir. 1983).

Finally, insofar as the appeal might be interpreted as a direct appeal of the current level of the appellant's workers' compensation benefits, I find that such matters are beyond the Board's jurisdiction. *Jackson v. Office of Personnel Management*, 27 M.S.P.R. 2, 3 (1985) (Board has no jurisdiction to order payment of workers' compensation benefits).

Accordingly, I conclude that the appellant has not alleged facts which, if proven, would show that any appealable action occurred, and the appeal must therefore be dismissed for lack of Board appellate jurisdiction, without a hearing.[12] *See Dumas*, 789 F.2d at 894. Absent an appealable action, the appellant's prospective defense of illegal discrimination is also beyond the Board's jurisdiction. *See Cruz*, 934 F.2d at 1244. Accordingly, I do not provide him with mixed case appeal rights. *Id.*

---

[12] In light of this decision, I find that I need not address the issue of the apparent untimeliness of this appeal. *See Holser*, 77 M.S.P.R. at 94, *citing Popham v. United States Postal Service*, 50 M.S.P.R. 193, 197 (1991).

DECISION

The appeal is DISMISSED.

FOR THE BOARD:

/s/ Philip D. Reed
Philip D. Reed
Administrative Judge

NOTICE TO APPELLANT

This initial decision will become final on ***August 23, 1999***, unless a petition for review is filed by that date or the Board reopens the case on its own motion. This is an important date because it is usually the last day on which you can file a petition for review with the Board. However, if this initial decision is received by you more than 5 days after the date of issuance, you may file a petition for review within 30 days after the date you actually receive the initial decision. The date on which the initial decision becomes final also controls when you can file a petition for review with the Court of Appeals for the Federal Circuit. The paragraphs that follow tell you how and when to file with the Board or the federal court. These instructions are important because if you wish to file a petition, you must file it within the proper time period.

BOARD REVIEW

You may request Board review of this initial decision by filing a petition for review. Your petition, with supporting evidence and argument, must be filed with:

The Clerk of the Board
Merit Systems Protection Board
1120 Vermont Avenue, NW., Room 806
Washington, DC 20419

If you file a petition for review, the Board will obtain the record in your case from the administrative judge and you should not submit anything to the board that is already part of the record. Your petition must be postmarked, faxed, or hand-delivered no later than the date this initial decision becomes final, or if this initial decision is received by you more than 5 days after the date of issuance, 30 days after the date you actually receive the initial decision. If you fail to provide a statement with your petition that you have either mailed, faxed, or hand-delivered a copy of your petition to the agency, your petition will be rejected and returned to you.

JUDICIAL REVIEW

If you are dissatisfied with the Board's final decision, you may file a petition with:

The United States Court of Appeals
for the Federal Circuit
717 Madison Place, NW
Washington, DC 20439

You may not file your petition with the court before this decision becomes final. To be timely, your petition must be *received* by the court no later than 60 calendar days after the date this initial decision becomes final.

NOTICE TO AGENCY/INTERVENOR

The agency or intervenor may file a petition for review of this initial decision in accordance with the Board's regulations.

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

CARL R. BENAVIDEZ, Appellant, v. DEPARTMENT OF THE NAVY, Agency.	DOCKET NUMBER SF-0752-99-0348-I-1 DATE: December 21, 1999

Carl R. Benavidez, Lincoln Acres, California, pro se.

Thomas R. Avey, San Diego, California, for the agency.

BEFORE

Ben L. Erdreich, Chairman
Beth S. Slavet, Vice Chair
Susanne T. Marshall, Member

FINAL ORDER

The appellant has filed a petition for review in this case asking us to reconsider the initial decision issued by the administrative judge. We grant petitions such as this one only when significant new evidence is presented to us that was not available for consideration earlier or when the administrative judge made an error interpreting a law or regulation. The regulation that establishes this standard of review is found in Title 5 of the Code of Federal Regulations, section 1201.115 (5 C.F.R. § 1201.115).

After fully considering the filings in this appeal, we conclude that there is no new, previously unavailable, evidence and that the administrative judge made no error

in law or regulation that affects the outcome. 5 C.F.R. § 1201.115(d). Therefore, we DENY the petition for review. The initial decision of the administrative judge is final. This is the Board's final decision in this matter. 5 C.F.R. § 1201.113.

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review this final decision. You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, 931 F.2d 1544 (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703).

You may read this law as well as review other related material at our web site, *http://www.mspb.gov*.

FOR THE BOARD: /s/ Robert E. Taylor
Robert E. Taylor

Washington, D.C. Clerk of the Board

United States Court of Appeals
for the Federal Circuit

ORDER

Before SCHALL, Circuit Judge, FRIEDMAN, Senior Circuit Judge, and DYK, Circuit Judge.

A petition for rehearing having been filed by the PETITIONER,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, DENIED.

The mandate of the court will issue on May 8, 2001.

FOR THE COURT,

/s/ Jan Horbaly (AV)
Jan Horbaly
Clerk

Dated: May 1, 2001

(FILED
MAY 1, 2001)

cc: Raymond H. Wood
Lauren S. Moore

BENAVIDEZ V NAVY, O0-3204
(MSPB – SF0752990348-I-1)

Note: Pursuant to Fed. Cir. R. 47.6, this order is not citable as precedent. It is a public record.